Supreme Court, U. S.
FILED
APR 23 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1975

NO. 75-1533

MARGARET CANADA,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

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OCTOBER TERM 1975

NO. ———

MARGARET CANADA,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this cause on December 29, 1975 and Petition for Rehearing with suggestion of Appropriateness for a Rehearing En Banc being denied February 23, 1976.

CITATIONS OF OPINIONS BELOW

The judgment and commitment of the District Court adjudging the Petitioner Guilty of Counts I and II of the indictment and sentencing her to two concurrent terms of five (5) years under Title 18, Section 4208(a) (2) U.S.C., and a fifteen (15) year period of special parole June 16, 1975. Decision of the Court of Appeals affirming the judgment of the trial court

December 29, 1975. Denial of a Petition for Rehearing with suggestion of the appropriateness of a rehearing en banc February 23, 1976. Denial of Motion to Withhold final decision until two companion cases have been decided March 16, 1976.

JURISDICTION

The Order of the Court of Appeals was entered February 23, 1976 and the Final Order of said court was entered March 16, 1976. This Honorable Court granted an extension of time to file Petition for Certiorari until April 23, 1976. The jurisdiction of this court is invoked under Title 28, Section 1254(1) U.S.C.

STATEMENT OF QUESTIONS INVOLVED

1. (a) May airport screening searches be employed as a source of information to initiate criminal investigation?
   (b) May a consent to search be properly construed from the mere silence of the person to whom the search is directed?
2. Whether information gleaned through secretly obtaining phone numbers dialed by guests at a motel, without their knowledge or consent, may be used to web a theory of probable cause to arrest and search.
3. Where the known owner of property sought to be searched, without a warrant, is physically present, may police search that person's property on consent given by a third party?
4. Does an accused suffer an impairment of her constitutional right to be free on bail to be accorded a fair and impartial trial and sentence? Where:
   (a) The trial court refuses to allow her to post bail unless an attorney for third persons disregard his confidential relationship with his clients and disclose the source of the bail money.
   (b) The trial court unnecessarily commented on the evidence favorably to the prosecution.
   (c) The trial judge refused to allow inquiry of a juror disclosed to have had a prior and existing amicable relationship with one of the principal witnesses for the prosecution.
   (d) The trial judge refused to consider defendant's plea for a more lenient sentence, because she would not aid the prosecution's efforts to prosecute other persons.

STATEMENT OF RELEVANT FACTS

This case originated at the Detroit Metropolitan Airport, where Petitioner and a male companion approached the American Airlines Security Checkpoint for preflight screening.

One of the Security Officers, Theresa Thomas, had a prior working arrangement with the Airport DEA Office, whereby she would report to that office her observations of any persons coming through her checkpoint carrying a large sum of cash. For this information, she would be paid various denominational amounts, depending on what an investigation revealed. In the instant case, she received a reward of TWO HUNDRED ($200.00) DOLLARS. In another case, she had received $50. On two other cases, she received nothing, because the investigations were not fruitful.

The information gleaned through searching travelers, at the security checkpoint, once reported to the DEA Office, would initiate an investigation of the particular traveler, to see if the money being carried would venture into a criminal enterprise.

In the instant cause, the security officer took possession of Petitioner's suitcase at the end of the conveyor belt and advised that the suitcase had to be opened because a portion of the contents of the suitcase could not be read on the x-ray screen.

Petitioner's male companion, who had carried the briefcase

to that point, inquired why the suitcase had to be opened, since there was nothing offensive in it. The security officer insisted that the suitcase had to be opened.

Before another word was spoken, the security officer opened the suitcase and observed a large bundle of cash in a paper bag, with the figure $68,000.00 on the outer cover of the bag. She fingered through the money to ascertain the denominations of the bills and returned the suitcase to Petitioner.

As soon as petitioner and her companion proceeded to board the aircraft, the security officer left her post and followed them to the boarding gate to determine what name petitioner was traveling under. All of this information was conveyed to the DEA Office.

DEA Agent, Paul Markonni, immediately initiated an investigation by checking on the male companion who did not board the aircraft and phoned to the San Diego DEA Office, the name petitioner was traveling under, her description and the description of the suitcase she was carrying.

Once petitioner arrived in San Diego, that DEA Office had agents dispatched to conduct surveillance of her and two other persons that met her at the airport.

While conducting surveillance, the DEA Agents went to the office of the motel where petitioner was staying as a guest, and secretly obtained the name she registered under and the phone numbers she had called. This information was phoned to the Detroit DEA Office who advised San Diego DEA that the phone numbers called by petitioner were listed to persons who had prior drug related backgrounds.

During continued surveillance, it was determined that the two people that met petitioner at the San Diego Airport had travelled to Mexico the next morning while petitioner remained at San Diego.

After petitioner's companions returned to the motel that afternoon, all three loaded their personal effects and proceeded toward Los Angeles.

The DEA Agents, assisted by the state police, overtook and

stopped the vehicle they were riding in and placed them all under arrest.

The Agent in Charge asked the lessee of the vehicle for permission to search and she said, "go ahead." Thereupon, another agent searched everybody's luggage, including petitioner's. The subject matter of the instant indictment was found in petitioner's suitcase. She gave no consent and the officers had no warrant.

During pre-indictment proceedings, petitioner was ordered held under a $150,000.00 bond, which was subsequently reduced, on motion, to $100,000.00. The Magistrate and District Judge refused to allow the bond to be posted unless and until the attorney for third persons, interested in petitioner's release, would disclose the identity of his clients furnishing the money for petitioner's bail. The attorney invoked the attorney-client privilege and petitioner was denied release on bail.

A pre-trial motion to suppress the evidence seized was denied, as well as several other motions for reduction of petitioner's bond and justification of the surety.

The two co-defendants stipulated to waive trial by jury and allow the court to decide their guilt or innocence on the basis of the testimony presented at the Evidentiary Hearing. The trial judge found them guilty of the conspiracy count only, and their appeals are presently pending before the Ninth Circuit Court of Appeals.

Petitioner's case was tried to a jury, with the understanding that motions directed to the admissibility of evidence would be considered during the course of trial.

Voir Dire of jurors was conducted. All jurors denied knowing any of the proposed witnesses read off. However, during the course of trial, it was disclosed that one of the jurors, Vincent Del Tondo, was a friend of Sgt. Redding, a principal witness for the government who was involved in the investigation of the case. After said disclosure, the government withdrew Sgt. Redding as a witness; however, the trial judge refused to allow any inquiry of the particular juror to determine if the relationship would affect his judgment in the case.

During cross examination of a principal government witness, the trial judge interrupted defense counsel and commented on a significant issue of evidence favorably to the government. Motion for mistrial was denied.

Petitioner was convicted of both counts in the indictment. At sentencing, the trial judge said that if he thought imposing a harsher sentence of thirty (30) years on the petitioner would force her to cooperate with the government, that would be his sentence. However, he theorized that she was genuinely fearful of her safety, but would not consider her for probation, because she did not help the government.

Petitioner was sentenced to serve two concurrent terms of five years under Title 18, Sction 4208(a) (2).

Petitioner was let to bail, for the first time, after sentencing, pending appeal.

The conviction of the trial court was affirmed by the Ninth Circuit Court of Appeals December 29, 1975.[1] Petition for Rehearing with Suggestion of the Appropriateness of Rehearing En Banc was denied February 23, 1976.[2] Petition to Withhold final decision until two companion appeals are decided was denied March 16, 1976.[3] This court granted extension tc file petition for certiorari to April 23, 1976.[4]

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[1] Decision of the Ninth Circuit Court of Appeals may be found in the appendix.

[2] Order denying Motion for Rehearing may be found in the appendix.

[3] Order denying Motion to Withhold Final decision may be found in the appendix.

[4] Order granting extension may be found in the appendix.

REASONS FOR GRANTING WRIT

I.

(a) AIRPORT SCREENING SEARCHES MAY NOT BE EMPLOYED AS A SOURCE FOR INFORMATION TO INITIATE CRIMINAL INVESTIGATIONS.

(b) MERE SILENCE DOES NOT EVIDENCE CONSENT TO SEARCH.

A thorough research of autorities has failed to uncover a single case decided by this court on the issue herein presented. We submit that the instant case presents as clear a fact picture as will ever come before this Honorable Court on the purpose and limitations of preflight screening searches. Moreover, the instant case offers this court an opportunity to address itself to the allowable extent of governmental intrusion into the privacy of air passengers as a source of initiating criminal investigations.

In the instant case, DEA Agents had a pre-arrangement with an American Airlines Security Officer, one Theresa Thomas, to report to their office any persons she observed going through her checkpoint carrying a large amount of cash. Once such a report was received, the passenger would be surveilled by government agents to and at their destination, to determine if criminal activity was in the making. If so, the airport security officer would be paid a reward for the information supplied. The amount of the reward would depend upon the significance of the crime uncovered to the government agents. If the information was not fruitful, no reward was paid.

On one prior occasion, Thomas had received a $50.00 reward for her information. On two other occasions, she had received nothing, because the information was not fruitful. On the instant case, she received a $200.00 reward.

In the instant case, petitioner, traveling from Detroit, Michigan to San Diego, California via American Airlines, appeared with a male companion at the security checkpoint. The male

was carrying a green suitcase, which he placed on the conveyor belt. As he and petitioner waited, Thomas took possession of the bag at the end of the conveyor belt and the following conversation ensued, at p. 214 of the trial transcript:

"Q. Now, what if anything did you say to the male that was carrying this green suitcase?

A. Well, I took the bag to the end of the belt and put it on the table and *I told him I had to open it and inspect it* because *I couldn't read what was on the x-ray*.

Q. And what did he say?

A. And *he asked* me *why I had to do it*, and that there wasn't anything in it, and I said, *well I have to* because *I couldn't tell, I couldn't identify* the object in the bag.

Q. What did he say to that?

A. He didn't say anything."

(Emphasis added)

The government did not contend that this conversation between the parties evidenced consent, nor did the trial court so find. However, the Court of Appeals ruled that the aforestated conversation evidenced consent-in-fact, voluntarily given. The court further found from said conversation that the security officer asked for permission to search the suitcase; that since neither petitioner nor her companion objected, the security officer was justified in assuming that she had the consent of both to search.

The decision of this panel of the Court of Appeals is contrary to prior decisions of the Ninth Circuit, as well as the great weight of authority. *U.S.* v. *Davis,* 483 F.2d 893 (9th Cir., 1973); *U.S.* v. *Moore,* 483 F.2d 1361 (9th Cir., 1973); *U.S.* v. *Alabarado,* 495 F.2d 799 (2nd Cir., 1974); *U.S.* v. *Edwards,* 498 F.2d 496, 501 (9th Cir., 1975); *U.S.* v. *Newton,* 510 F.2d 1149 (7th Cir., 1975); *U.S.* v. *Kroll,* 481 F.2d 884 (8th Cir.,

1973); *U.S.* v. *Allen,* 351 F.Supp. 749; *U.S.* v. *Meulender,* 351 F.Supp. 1284; *U.S.* v. *Krell,* 388 F.Supp. 1372.

The instant case is factually indistinguishable from *U.S.* v. *Davis,* supra.. In *Davis,* the appellant attempted to board a plane from San Francisco to Los Angeles. As he approached the boarding gate, a TWA employee told him a routine security check was necessary, reached for his briefcase, opened it, and found a gun. *Davis* had a friend with him at the time. The magistrate denied a motion to suppress the evidence finding consent-in-fact from appellant's late arrival and attempt to board the airplane. The district court affirmed. The Ninth Circuit Court of Appeals reversed and remanded.

The deciding panel, in the instant case, conceded that the instant case stands or falls on the propriety of the initial airport search, citing *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385, 391-392 (1920) (See Option in Appendix at p. 4). However, the court found that the foregoing excerpted conversation evidenced consent-in-fact. Such a finding is clearly erroneous. One would have to pervert the English language beyond elasticity to even imagine that the quoted conversation expresses a request for permission to search and consent-in-fact given.

It is clear from said conversation that the security officer expressed that the suitcase *had* to be opened, not *may* she open it. This, coupled with the fact that she had actual possession of the suitcase at the time, manifests her intention to act on her authority and not consent. From the positiveness in the manner in which Thomas expressed that the suitcase had to be opened, petitioner and her companion could reasonably assume that objecting would make no difference. However, the law is clear that a passenger must be warned of his right to avoid preflight screening searches by electing not to board the aircraft. *U.S.* v. *Davis,* supra at 912 (9th Cir.):

"In sum, airport screening searches of the persons and immediate possessions of potential passengers for weapons and explosives are reasonable under the Fourth Amend-

ment *provided* each prospective *boarder retains the right to leave rather than submit to the search.*"

(Emphasis added)

In reaching its conclusion, the deciding panel, in the instant case, opined that petitioner and her companion had a duty to object as a prerequisite to preventing an unreasonable search of her suitcase. The court concluded that their failure to do so was a manifestation of consent. This is clearly erroneous.

The law is well settled that, rights of constitutional dimension can only be waived where the purported waiver is clear and unequivocal, which, of course, requires more than mere silence. *Johnson* v. *Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 82 L.Ed 461 (1938). Moreover, one does not waive a fourth amendment right by exercising a fifth amendment right. *Boyd* v. *U.S.*, 116 U.S. 616 (1886); *Silverthorne Lumber Co* v. *U.S.*, 251 U.S. 385 (1920); *Farris* v. *U.S.*, 24 F.2d 639 (9th Cir.).

However, in the instant case, an objection to the search of the suitcase is clearly expressed when petitioner's companion demanded to know why it had to be opened since there was nothing offensive inside. The lower court record is wholly silent as to whether there were signs posted to pre-warn passengers of searches as required by law. *U. S.* v. *Edwards*, 498 F.2d 496, 501.

Although the deciding panel, in the instant case, alludes to *Davis*, supra being the law of the 9th Circuit, (Opinion, p. 5) the court opined, 'the present case falls somewhere between the verbal consent in *Bustamonte* and the facts in *Davis*. [*Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973)]. The court went on to say, "In *Davis* the appellant's briefcase was taken from his hand, opened before he had a chance to really do or think anything." This is clearly not a valid distinction because in each case the searcher had actual physical possession of the article searched. Secondly, the record in neither case reflects the time lapse between the expression of the necessity to search, and the effecting of the search. Finally, the court should not place itself in the position of deciding how long it should take one to make up his mind. Some people are prone to make decisions quicker than others.

The court's suggestion that the instant case falls *between* consent actually given and no consent is clearly misplaced. There can be no *in between;* there is either consent or there is not. In the instant case, there was clearly no consent.

EXPECTATION OF PRIVACY

Money is not per se evidence of a crime, contraband, explosives or offensive weapons. Money is deemed in our society as one of our most precious possession, and certainly falls within the ambits of those possessions protected by the Fourth Amendment.

Katz v. *U. S.*, 389 U.S. 347, 361, 88 S. Ct. 507, 516, 19 L. Ed.2d 576 (1967) imposes "a twofold requirement, first that a person has exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable." (Harlan, J., concurring).

The first requirement is satisfied in that, here, petitioner relied on the privacy of her suitcase to conceal the money she was carrying. *Davis* at 905.

The second requirement is satisfied from our common knowledge of what society universally thinks about money. This fact is self evident from the efforts employed daily to protect, safekeep and conceal money.

Moreover, travelers have a right to expect that security officers, as in the instant case, will maintain the confidence and not disclose to *anyone* non-offensive articles observed during preflight screening searches.

Here, the security officer betrayed that trust in exchange for her personal pecuniary gain. This court cannot justify allowing the constitutional rights of citizens to be free from unreasonable searches and seizures to be bartered away for individual personal gain.

PURPOSE OF THE SEARCH

The purpose of airport screening searches is appropriately expressed in *Davis, supra* at 908:

> "To prevent the carrying of weapons or explosives aboard aircraft, and thereby prevent hijackings. The essential purpose of the scheme is not to detect weapons or explosives or to apprehend those who carry them, but to deter persons carrying such material from seeking to board at all."
>
> (See also, *U. S.* v. *Kroll*, 481 F.2d 884, 886).

The essential purpose of preflight searches was clearly subverted here by the security officer's initiating a criminal investigation as a result of having seen a large sum of money in petitioner's suitcase. *Davis,* supra at 909; *U. S.* v. *Kroll,* supra; *U. S.* v. *Newton,* supra.

Obviously, the rewards being paid to airline screening employees will cause more searches than is necessary to meet the administrative need that justifies it. *Davis,* supra at 910.

It would be tragic in the history of our jurisprudence if this Honorable Court allows this unfortunate decision to stand. Many innocent citizens are bound to suffer from the wrath of this decision.

II.

INFORMATION GLEANED THROUGH SECRETLY OBTAINING PHONE NUMBERS DIALED BY GUESTS AT A MOTEL, WITHOUT THEIR KNOWLEDGE OR CONSENT OR A COURT ORDER, MAY NOT BE USED TO WEB A THEORY OF PROBABLE CAUSE TO ARREST AND SEARCH.

In the instant cause, the police went to the motel manager and secured, secretly, all of the phone numbers appellant had phoned during her stay at the motel. These phone numbers were phoned back to Agent Markonni in Detroit, to see if any of the persons phoned might be significant in the investigation. This was part of the probable cause the deciding panel refers to on pages 9 and 10 of the Opinion as a basis for the subsequent arrest and search. We contend that this evidence was obtained illegally and should have been suppressed.[5]

The law is abundantly clear that every citizen has a reasonable expectation of privacy that government agents do not have access to the telephone numbers called by said citizen while a guest at a motel. Being a guest at a motel does not deprive one of all privacy. *Stoner* v. *California,* 376 U.S. 490 (1964), holding that, a guest in a hotel room is entitled to the constitutional protection against unreasonable searches and seizures and that an employee of the hotel may not waive that right. The court said, id at 489:

> "When a person engages a hotel, he undoubtedly gives implied or express permission to such persons as maids, janitors or repairmen to enter his room in the performance of their duties . . . but the conduct of the night clerk and the police in the present case was of an entirely different order."

The Supreme Court expanded the Fourth Amendment protections to include all reasonable expectations of privacy. *Katz* v. *U. S.*, 389 U.S. 347. The Supreme Court has said that the courts are not bound by common law distinctions such as

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[5] S/A Paul Markonni's information to S/A Perkins that Boyer Bracy was arrested as a violator of the Controlled Substance Act was clearly erroneous, because the Controlled Substance Act was not in esse until April 1, 1972, accordingly, he could not have been arrested for that offense. Moreover, Bracy was a 16 year old juvenile in 1968 and would not have been of record anyway (See Brief pages 25-27). Markonni's information was not dated or verified. He had had no prior contact or knowledge of Bracy or appellant as a narcotics investigator. His information about Bracy's parents was admittedly incorrect (See Evidentiary Hearing Transcript pp. 24-25; Brief pp. 6-8).

trespasses, etc., in deciding the search and seizure problem. *Jones* v. *U. S.*, 362 U.S. 357, 366.

Speaking on the expectation of privacy of phone subscribers, the California Court of Appeals said in *People* v. *McKunes*, 51 C.A. 3d 487, 492 (1975):

> "A subscriber has a reasonable expectation that records of his calls will be utilized only for the accounting functions of the telephone company in determining his bills. He has no reason to expect that his personal life, as disclosed by the calls he makes and receives, and the day and time of those calls, will be disclosed to outsiders without some more judicial inquiry into the need for such invasion and its extent." (See also, *Burrows* v. *Superior Court* [1974] 13 C.ed 238).

The very purpose for having unlisted phone numbers is the security and peace of mind the subscriber has in knowing that his numbers will fall in the hands of only those persons who he wishes to have it.

While part of the accounting function of a motel business is to keep records of the phone calls made by guests to facilitate proper billing and to resolve any dispute as to the amount of the bill, that privilege does not extend to turning those numbers over to the police without court approval in advance. *McKunes*, supra.

Clearly, the deciding panel has resolved this issue contrary to decisions of the United States Supreme Court.

III.

WHERE THE KNOWN OWNER OF PROPERTY SOUGHT TO BE SEARCHED, WITHOUT A SEARCH WARRANT, IS PHYSICALLY PRESENT, POLICE MAY NOT SEARCH THAT PERSON'S PROPERTY ON CONSENT GIVEN BY A THIRD PARTY.

In the instant case, some five carloads of police pursued the vehicle in which appellant was riding and stopped it on the highway. The occupants of the car were ordered out and advised that they were being detained for investigation of smuggling controlled substances. At least one officer had a gun drawn. (E.T. 74-75, 98, 107)[6] The agent determined that Welsh was leasing the vehicle, Turner was the driver and appellant was a rear seat passenger. S/A Perkins inquired of Welsh whether she had any contraband or narcotics in the car. She responded, "No, I don't." Perkins then stated, "If you don't have any narcotics, do you mind if I search the car?" Welsh said, "No, go right ahead." All the time, appellant was standing right beside Welsh. (E.T. 76)

S/A McCoy took the keys out of the car and proceeded to search the yellow duffel bag taken from the trunk, then on to the green suitcase, which was likewise removed from the trunk, wherein he found the narcotics.

Defendant Welsh testified that she gave consent because she was frightened and was told that she was under arrest. She did not consider that any consent she gave would extend beyond the yellow duffel bag (E.T. 135). At no time did she ever possess or handle the green suitcase (E.T. 105-106).

After listening to the arguments of defense counsel, the district court inquired of the government at E.T. 146, *"Assuming the consent is good, doesn't it stop before it gets to that green suitcase when they know the green suitcase is Mrs. Canada's, hat she has carried it from Detroit?"* (Emphasis

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[6] E. T. references are directed to testimony in the Evidentiary Hearing transcript.

added). The district court went on to deny the motion to suppress.

We submit that the coercive manner in which the consent of Welsh was obtained was not consent freely and voluntarily given.

In *Herter* v. *U. S.*, 27 F.2d 521 (9th Cir., 1928) the facts were strikingly similar to those of the instant case. The officer went to the defendant's house to purchase intoxicating liquor. He rang the bell and defendant answered the door. The officer asked the defendant, did he have any beer; defendant said, "no." The officer saw 2½ cases of beer in the hall and told defendant he had a still there; defendant denied that he had a still. At this point, the agent said, "if you have not, you do not mind my looking for it." At this point, the defendant invited the agent inside. The court found that there was no free and voluntary consent given.

In *Farris* v. *U. S.*, 24 F.2d 639, 640 (9th Cir., 1928), as the officers approached defendant's house, they observed defendant standing in the doorway in nightwear. After seeing the officers, defendant closed the door quickly and ran back into the house, and out onto a rear porch. He grabbed something quickly and started back through the house and the officers heard a breaking inside. The officers entered the house and one of them told defendant they came there to look over the house or search. Defendant replied, "All right. You will find nothing here now." The court held there was no consent to the search. The court said at 640:

> "It is very plain from this that the search was not made because of the consent, but would have been made at all events."
>
> (Citing – *Amos* v. *U. S.*, 255 U.S. 313, 41 S. Ct. 266).

It is clear, in the instant case, that the officer intended to stop and search the vehicle in question, consent or not. One would be sanguine to the fullest extent to believe that the surveilling officers would request the assistance of backup

police units to overtake and stop the vehicle, and order the occupants outside to see if someone would consent to a search. Moreover, the U. S. Attorney's Office had informed the officers earlier that day that there was probable cause to arrest the occupants and search the vehicle upon its return across the Mexican Border. Obviously, S/A Perkins had no intention of obtaining a warrant, because he had never obtained a warrant before (E.T. 69, 103-104).

Obviously, the search would have been made in all events, just as the court said in *Farris, supra.* Accordingly, there was a need to show independent probable cause and exigent circumstances to support the search without a warrant. [See also, *Cash* v. *Williams,* 455 F.2d 1227 (CA 6, 1972)].

The deciding panel states that the warrantless arrests were justified from the finding of the contraband. However, this statement is clearly erroneous. An arrest is never justified on what is found in a search, there must be independent probable cause to make the arrest itself. On the other hand, a valid search without a warrant may be made incidental to a lawful arrest, provided the search is not extended beyond the permissible area. *Chimel* v. *California,* 395 U.S. 752; *Vale* v. *Louisiana,* 399 U.S. 30.

Contrary to the suggestion of the court on page 10 of the opinion, *Hernandez* v. *U. S.*, 353 F.2d 624, 627 (9th Cir., 1965), is not comparable to the present fact situation. All of the facts combined in the instant case were consistent with innocent conduct. *U. S.* v. *Kroll,* 481 F.2d 884, 887; *U. S.* v. *Moore,* 483 F.2d 1361, 1363, 1364 (9th Cir., 1973).

The deciding panel clearly errs in assigning the facts of the instant case to the category of cases characterized the "automobile exception." The exigent circumstances known in *Chambers* v. *Maroney,* 399 U.S. 42 (1970) were not present in the instant cause. The officers here had every one under arrest and the vehicle under control in broad open daylight. (of *Cash* v. *Williams,* supra).

On page eleven of the opinion, the court incorrectly stated that the car made a short trip to Mexico carrying a suitcase

in which a large sum of cash had been seen. First, there is no revelation of the period of time the car was in Mexico. Second, the yellow duffel bag was in the car when it went to Mexico and no money was ever seen in said bag. Moreover, the court's suggestion that the agents had no way of knowing if the car would return to the Southern District of California does not hold muster, because one of the group remained at the motel and none of the parties had checked out. The agents reasonally knew they would return, that is why they kept surveillance on the motel. The agents had no intentions of seeking a warrant.

In every case examined by us, we have found that where the issue of the validity of a third party's consent to a search, it involves an absentee defendant. In the instant case, the appellant was present when the search of the green suitcase occurred, wherein the contraband was found. As the district court observed at E.T. 146, the agents knew the suitcase was hers, she carried it from Detroit. Co-defendant Welsh had no apparent connection with the green suitcase. Accordingly, any consent that Welsh gave to the officers to search could not extend to the green suitcase any more than if an officer walked up to 100 soldiers and asked one of the group could he search everybody's bag, with full knowledge that 99 of the 100 bags did not belong to the person asked. *Stoner* v. *California,* supra; *Chapman* v. *U. S.,* 365 U.S. 610 (1961); *Cunningham* v. *Hernze,* 352 F.2d 1 (9th Cir., 1965); *People* v. *Stage,* 7 C.A. 3d 681 (1970); *State* v. *Johnson,* 85 N.M. 465, 513 P.2d 399; *People* v. *Weinstein,* 245 N.E.2d 788; *May* v. *State,* 199 So.2d 635; *State* v. *Hall,* 142 S.E.2d 177; *Piazzola* v. *Watkins,* 442 F.2d 284 (5th Cir., 1971); *People* v. *Flowers,* 179 N.W.2d 56 (1970).

IV.

AN ACCUSED SUFFERS AN IMPAIRMENT OF HER CONSTITUTIONAL RIGHT TO BE FREE ON BAIL PENDING TRIAL, AND BE ACCORDED A FAIR AND IMPARTIAL TRIAL AND SENTENCE WHERE:

(a) The trial court refuses to allow friends of petitioner to post her bond, unless an attorney for third parties disregard his confidential relationship with his clients and disclose the source of the bail money.

Petitioner is a separated woman, receiving ADC benefits for herself and two minor children in Detroit, Michigan. Her bail was initially fixed at $150,000.00 by the magistrate and continued to the trial court. Constant pressures were being exterted by the court to aid the United States Attorney's Office in their investigation of other persons. For example, the trial judge said at petitioner's sentencing that:

> "I have the feeling that the only reason she hasn't cooperated with the government is her personal fear which I suspect in this instance is well founded. Therefore, *I am going to sentence her on the basis that, because of that fear, she's not going to cooperate with the government. If I thought I could get her cooperation by giving her thirty years, I'd give her thirty years–*" (Emphasis added)

It was only after petitioner's sentencing that the trial court would approve the posting of petitioner's $100,000.00 bond.

All during pretrial proceedings, the court refused to justify the surety so that the bond could be posted. Hearings were conducted in Michigan and San Diego on the sole issue of justification of the surety. In each instance, the court refused to allow the bond to be posted unless the names of the persons furnishing the money were disclosed.

(Hearing March 14, 1975, at p. 6):

MR. SCIARRETTA: "Your Honor, would you be willing

or do you want to hear from Mr. Rice on the record as to the assertions that I have made?"

THE COURT: "No, not unless he's going to tell me on the record under oath where that money came from."

It is obvious, from the overall picture, that the court's primary concern with the posting of petitioner's bond was to force the disclosure of information that would assist the government's ongoing investigation of other possible offenders. This clearly dissolves the neutrality required in the guaranteeing an accused fair consideration of pretrial matters and a fair trial. This fact becomes even more obvious after the court was convinced that no governmental cooperation was forthcoming from the petitioner, the trial court released her on an appeal bond with even less collateral.

While we contend that the amount of the bond was unreasonable, due to the lack of any prior record and community ties, the court's actions in refusing to allow the posting of bail by imposing impossible conditions so as to thwart the obvious purpose of bail and serve as a thinly veiled cloak for preventive detention, was highly improper. *U. S.* v. *Leathers,* 412 F.2d 169, 134 U.S. App. D.C. 38.

Here, the court put the right to be released on reasonable bail out of reach of petitioner, as she would have no control over an attorney that was not representing her at the time. Moreover, the attorney could not disclose that information, due to the possible detriment to his clients. *U. S.* v. *Nunez,* 483 F.2d 453 (9th Cir., 1973); *Baird* v. *Koerner,* 279 F.2d 623 (9th Cir., 1960); In re: Grand Jury Appearance of Alvin S. Michaelson, Esq. Docket No. 74-3409 (9th Cir., 1-22-75).

The Bail Reform Act specifically favors release of a defendant awaiting trial under minimal conditions. *U. S.* v. *Gillin,* 345 F. Supp. 1145; *U. S.* v. *Honeyman,* 470 F.2d 473. Being released on bail so that the accused is free to use her efforts to assist counsel in the preparation of her defense, and to be available for private interviews of counsel's office without

the apprehension of being overheard is invaluable to the effective assistance of counsel.

(b) The trial court unnecessarily commented on evidence favorably to the prosecution.

One of the most heatedly contested issues in the trial of the instant case was whether petitioner was carrying $68,000. It was the argument of the government that this was the probable amount necessary to purchase the contraband found in petitioner's suitcase.

During defense counsel's cross examination to test the memory of the government's principal witness, the court interrupted as follows, at T. 255:

Q. "Do you think you could identify everyone of those pantsuits?

A. Not in detail.

THE COURT: *Did any of them have $68,000 with them?*

(Emphasis added)

Q. Well, let's get into that aspect. Miss Thomas you don't know – how much money was in that bag, do you?

A. No, I don't.

Q. And when his Honor says $68,000, you don't know that, do you?

A. Except for the figure written on front, but I don't know."

This was clearly not a question by the court to clear up an ambiguity. The remark was clearly designed to assist the prosecution to nail down a hotly contested issue in the case, which could not otherwise be proven. *U. S.* v. *Fernandez,* 480 F.2d 726.

(c) The trial judge's refusal to allow inquiry of a juror disclosed to have had a prior and existing amicable relationship with one of the principal witnesses for the prosecution smudged the appearance of justice.

In the instant case, it was brought to the attention of the court, by the Assistant United States Attorney, that one of the jurors, Vincent Deltondo, was personally acquainted with Sgt. Redding, a principal government witness and one of the investigating officers that participated in the surveillances and arrests of the defendants. Counsel advised that the relationship between the officer and the juror had always been amicable (T. 234-235).

Although the names of all prospective witnesses were carefully read during voir dire of the jury, including the name of Sgt. Redding, all jurors, including Mr. Deltondo, denied knowing any of the prospective witnesses.

Defense counsel requested that an inquiry be made of said juror so that an intelligent and fair determination could be made of his fitness to continue as a juror. Two alternate jurors were seated. The court refused to allow any inquiry of the juror. This was clearly erroneous.

This argument is addressed to more than just general fairness or a substantially fair trial. This argument is addressed to the very appearance of justice. *Mooney* v. *Holohan,* 294 U.S. 103; *Brady* v. *Maryland,* 373 U.S. 73, 83 S. Ct. 1194.

It is difficult to understand why the court refused to allow an inquiry of said juror, since nobody could be prejudiced thereby. There were sufficient alternatives to replace him if it were deemed that he should have been excused.

Because of the prejudicial misconduct of the trial court, petitioner stands convicted of serious offenses for which she has been sentenced to five (5) years plus fifteen (15) years special parole, wondering if the jury that convicted her was tainted. One can only wonder what affect that one juror might have had on the ultimate decision in petitioner's case. Certainly, he could have been excused with a peremptory challenge.

Justice should never appear to be a stacked deck against an accused as the trial court consistently allowed in the instant case.

(d) The trial judge's refusal to consider petitioner's plea for a more lenient sentence, because she would not aid the government's efforts to prosecute others, is a void sentence.

In the instant case, the trial judge made it clear that petitioner's failure to set aside her fear for her safety and come forth in assisting the government in their investigation of other possible violators, forfeited any chance she had for a more lenient sentence (T. 419). Petitioner's sentence was clearly illegal, because of the factors considered by the court in imposing it.

It is to be noted that one of the co-defendants with a prior criminal record received a lighter sentence than petitioner, which was grossly unfair, and can only be attributed to the fact that petitioner more vigorously fought her case. [See *People* v. *Jones,* 254 N.E.2d 843 (1969].

CONCLUSION

A sense of justice and concern for the uniformity of our national jurisprudence compels this Honorable Court to grant Certiorari in this cause.

Respectfully submitted,

/s/ WILFRED C. RICE

Attorney for Petitioner

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APPENDIX

IN THE UNITED STATES DISTICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HONORABLE LELAND C. NIELSEN, JUDGE PRESIDING

Criminal No. 75-0337

UNITED STATES OF AMERICA,
Plaintiff,

v.

MARGARET CANADA,
Defendant.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

San Diego, California
Friday, March 14, 1975

APPEARANCES:

For the Plaintiff:

HARRY D. STEWARD
United States Attorney

BY: ROBERT D. KRAUSE
Assistant United States Attorney

For the Plaintiff:

JOSEPH A. SCIARRETTA, ESQ.
U. S. National Bank Building
San Diego, California and

WILFRED C. RICE, ESQ.
2436 Guardian Building
Detroit, Michigan 48226

[2] SAN DIEGO, CALIFORNIA, FRIDAY, MARCH 14, 1975, AT 4:30 P.M.

THE CLERK: No. 1A on calendar, Case 75-0337, United States of America v. Margaret Canada for further bail review.

MR. SCIARRETTA: Thank you, your Honor. Joseph Sciarretta appearing on behalf of Margaret Canada, the defendant. I was told that she would probably be made available to be present at the hearing.

THE COURT: She is.

MR. SCIARRETTA: Thank you, your Honor.

Mr. Wilfred C. Rice, an attorney admitted to practice law in the state of Michigan, a member of good standing of that Michigan Bar, is present in court. He has flown out here from Detroit, Michigan, his home and also place of business, to testify, if necessary.

Your Honor, sometime during last – well, it was this week; it was Tuesday afternoon – in Detroit at approximately 3:30, as you reiterated this morning, a Mr. Charles Goldfarb, a bondsman was interviewed. At that time he indicated that Mr. Rice gave to him certain amounts of cash totaling $60,000 to effect a premium, and also to be used as collateral for Mrs. Canada's surety bond which I have attempted to file with the U. S. District Court. Mr. Rice indicated to Mr. Goldfarb at that time that he would not divulge the name of the person who gave him the money because that person presenting the money to him was [3] also a client, and he by telephone notified this Court through Magistrate McCue that he was invoking the attorney/client privilege with regard to that disposition of the money.

Your Honor, if Mr. Rice were called to testify – and he is present to do so – he would indicate to the Court that the person who has approached him with the financial contribution to put the bond up for Mrs. Canada is in fact a client of his. Mrs. Canada is also a client of Mr. Rice, and if I may explain the relationship, I am attorney of record. I am representing Mrs. Canada in proceedings before the United

States District Court here in California. Mr. Rice has also been retained as co-counsel to represent her and her interests.

Now, I have some case authority that I have looked into. I know that his Honor may have made up his mind with regard to the claim of privilege. I would merely in a very short fashion attempt to create for the record and for his Honor our explanation of our position in this matter. I rely upon the case of United States v. Nunez which is a Ninth Circuit Court case and that's a 1973 decision. In that case the defendant Mr. Nunez was convicted of conspiracy. One of the elements, one of the elements of evidence that was used against him at that proceeding was the fact that he, while not incarcerated, although albeit a suspect, put up the bond for three co-conspirators and the Court indicated that by doing so, by putting up the bond for those people who were subsequently labeled as co-conspirators, [4] he was acting in furtherance of the conspiracy.

By way of analogy, and I use the hypothetical, the person who is Mr. Rice's client may or might be in some way involved in this transaction. If, in fact, his name is disclosed as being the person who puts up the bond or money to secure the bond in this case, under the Nunez decision that, in fact, is sufficient to find him guilty of conspiracy in this matter. Using that case as authority, I would say that, number one, that case as it applies here would justify Mr. Rice in not disclosing the name or identity –

THE COURT: I have no question at this particular time, Mr. Sciarretta, that Mr. Rice has a perfect right to rely upon the attorney/client privilege and not say who handed him this $60,000 in cash. That is not the question before this Court.

MR. SCIARRETTA: Well, I was under the impression in receiving at least a telephonic account of the letter that Magistrate "Convies" from Detroit had prepared that there did not seem to be much of an issue at all with regard to the surety or the Goldfarb agencies in putting up the bond. I felt that they were, those officials were, at least felt secure that there was adequate collateral and adequate monies to

secure her appearance and if she did not appear, that the government would have no difficulty in collecting on a surety bond. Now, I may be wrong.

THE COURT: That's not quite – well, that may be; you may [5] be right in that – but that's not the Court's concern about the matter. The Court is concerned – I want to know where that $60,000 came from. I want to know whose money it is. I want to know why they are interested in putting up $60,000 of their cash money for a $10,000 premium on a hundred thousand dollar bond, and without that information under oath, I'm not going to approve the bond.

MR. SCIARRETTA: Your Honor, I have heard the rationale, but I would request that the Court reiterate for the record, number one, whether or not they are seeking the information from the indemnitor to establish motive for putting up the money, or, number two, to determine whether or not there's adequate surety for this corporate bond.

THE COURT: Mainly it's the motive to see what would induce somebody – what the relationship with this defendant is of the person who's willing to put up his or her $60,000 in cash to help get Mrs. Canada out on bail.

MR. SCIARRETTA: Your Honor, as you may or may not know, in this case there was an attempt on the part of the defense to put before the Court real property to secure a bond which real property was also disallowed, or found to be not acceptable by the United States Magistrate. I would merely indicate that at that time the names of the parties who were putting up the real property were disclosed but were found to be unacceptable because of a Narcotics Task Force officer's assertion that those people [6] may in fact be involved in narcotics traffic.

I was also reminded by Mr. Rice, your Honor – and I'm sure the Court is aware of this – that the defendant's mother, Mrs. Gooden, made an appearance in this district from her home state of Michigan. She was here for approximately one week and, in fact, pledged her real property which had an equity of only five thousand dollars but represented all that

the family had and they were willing to place that before the Court. There, again, your Honor, that property was determined to be insufficient to secure the appearance of the defendant.

Your Honor, would you be willing or do you want to hear from Mr. Rice on the record as to the assertions that I have alleged?

THE COURT: No, not unless he's going to tell me on the record under oath where that money came from.

MR. SCIARRETTA: Well, from a practical standpoint, your Honor, I'm at odds because I can see the Court's position in making inquiry, but it seems as though – and maybe this is just the practical result – that there's more of an ongoing investigation as opposed to satisfaction of the surety. In other words, is it the Court's position that they want to know who is putting up the money for further investigation?

THE COURT: I want to know who is putting up the money from one standpoint: to find out what motive she'll have to come back to court if she's allowed out on bond. I'm interested in finding [7] out whether, whoever this mysterious person is who's putting up $60,000 of his or her cash money, whether they have a motive to keep Mrs. Canada from coming back to court which is the primary motive which has happened not only in this district but in other districts. People with very substantial motives to not have defendants appear in court have put it up.

MR. SCIARRETTA: Then are you asserting, your Honor, that there is a fear –

THE COURT: I'm not asserting anything. I'm saying I am not going to approve this bond unless I have testimony under oath that is acceptable to the Court as to where the money is coming from, who's putting it up and what their motive is in putting it up.

We can get this case to trial in two weeks if you want to. We'll try it the week of the 25th.

MR. SCIARRETTA: Well, your Honor, I'm sure, as you know, there will be – we'll be discussing on Monday, on the

17th of March, a motion/disposition setting date and I anticipate that there will be motions filed because of the magnitude of the case and I think that – I appreciate the Court's concern – but –

THE COURT: When there are four pounds of heroin and a pound of cocaine involved, the U. S. Attorney's Office is interested and the Court is interested in finding out who's putting up $60,000 in cash to secure as premium and as partial collateral on the bond.

[8] MR. SCIARRETTA: Well, that basically is my position, that the investigation is not to satisfy the Court that the amount of collateral or that the bond is good, but merely as an avenue to continue an investigation into alleged illicit connections with Mrs. Canada.

Now, the Court has fixed bond which the Court deems reasonable in the amount of one hundred thousand dollars. We're prepared to file such a bond with the Court to assure her appearance. Now, I think if in fact the threat of not accepting the bond until we have heard from someone else is merely for an ongoing investigation on the part of the Narcotics Task Force, then –

THE COURT: I'm not here to help the Narcotics Task Force or any ongoing investigation. I'm here with the idea in mind that I want to see Mrs. Canada in this court at all times that she's due here, and to see that she is able to arrive here safely.

Now, I can easily see, Mr. Sciarretta, that somebody apparently back in Detroit could have a very strong desire to see that she never comes back into this court or any other court, with very strong reasons for that feeling.

MR. SCIARRETTA: I can see, your Honor, where you would have those suspicions. They have been voiced by other officials of this court, but I was going to ask Mr. Rice to step forward and address the Court with regard to the main issue that the Court must decide: whether or not Mrs. Canada will make her [9] court appearances. Would you care to hear from him?

THE COURT: Not unless he's going to testify under oath as to where this money came from.

MR. RICE: I'm not going to name the client, but it came from a client.

THE COURT: That is not satisfactory, Mr. Rice.

MR. SCIARRETTA: As I indicated, your Honor, he's compelled to claim a privilege in this matter because of the incriminating or potential incriminating nature of divulgence in this case.

THE COURT: All right, that's the way it is.

The court's in recess.

(Adjournment.)

[CERTIFICATE OMITTED]

RELEVANT EXCERPTS FROM TRIAL TRANSCRIPT

---

[214] Q Now, what, if anything, did you say to the male that was carrying this green suitcase?

A Well, I took the bag to the end of the belt and put it on the table and I told the male that I had to open it and inspect it because I couldn't read what was on the X-ray.

Q And what did he say?

A And he asked me why I had to do it, and that there wasn't anything in it, and I said, "Well, I have to because I couldn't tell, I couldn't identify the object in the bag."

Q What did he say to that?

A He didn't say anything.

Q Now, the individual that you have identified here in court seated at counsel table here: did she say anything while this was going on?

A No, she didn't.

Q How close was she to the man who was doing the talking?

A She was standing beside him.

Q Did you thereafter open the bag?

A Yes.

Q And what was inside?

A There was a brown paper shopping bag and I can't remember the article of clothing. It was either a blouse, maybe a jacket, was on the right side of it.

Q Do you recall what color that article of clothing was?

A I couldn't tell you. I know it was dark.

• • •

[224] Q Since that time, if you can approximate, how many people have you checked, say, since —

Did you work yesterday?

A No.

Q Well, if it was ninety days, and I don't know if it's been that many, but if it was ninety days, would it be forty-five or fifty thousand people? Would that be fair?

A Yes.

THE COURT: It would be four hundred fifty thousand.

MR. SCIARRETTA: That's why I practice law. I couldn't do anything else.

THE WITNESS: I work a seven and a half hour day and that's maybe five or six thousand, something like that, is what I check through.

BY MR. SCIARRETTA:

Q So you have seen or you have checked approximately four hundred to four hundred fifty thousand people since this incident.

A Yeah.

Q Would you say half of those are male?

A Yes.

Q And of the approximately two hundred thousand people that you have checked since then, have any of those females worn pantsuits?

A Yes.

[225] Q Have any of those been beige?

A Yes.

Q Do you think that you could identify each and every one of those pantsuits?

A Not in detail.

THE COURT: Did any of them have $68,000 with them?

Q Well, let's get into that aspect. Miss Thomas, you don't know how much money was in that bag, do you?

A No, I don't.

Q And when his Honor says $68,000, you don't know that, do you?

A Except for the figures written on front, but I don't know.

Q Now, would it be fair to say that you can recall a person wearing a beige suit similar to the one that you were shown, Government's 2?

A You mean the same day?

Q Well, no, you have identified the Exhibit No. 2 as being the beige pantsuit, have you not?

A Yes.

Q Well, is it your testimony that it's similar in nature? You can't identify it exactly, can you?

A No.

Q With regard to the green suitcase, Miss Thomas, you have also identified that as having seen that before.

[226] A Yes.

Q Would you say that you see approximately as many suitcases as you do people?

A Yes.

Q And would you say that there are a lot of green suitcases?

A Yes.

Q Just for the sake of convenience, can we say you have seen a hundred thousand over that period of time?

A Yes.

Q Well, when you tell this jury that you identify that suitcase, you don't really recall that this is the specific suitcase, do you?

A It looks familiar.

Q Okay. It looks familiar, but you can't say with definity that that is the very suitcase, can you?

A No.

Q Miss Thomas, did you ever see –

By the way, can you specifically identify the female in the blue pantsuit as being the woman that you saw back on February 16th?

MR. PETERSON: Objection, your Honor; that's a misstatement of the evidence.

THE COURT: Sustained.

• • •

[233] THE COURT: Let the record show these proceedings are outside the presence of the jury at the request of defense counsel.

MR. SCIARRETTA: Yes, you Honor; it is at my request.

I respectfully make the motion of the Court – first of all. I would voice my objection to the comment of the Court focusing upon the Court's comment as to the $68,000, and, briefly, to give some background. I was asking the witness at that time how she remembered the suitcase, and I believe the Court's comment was – and please correct me if I'm wrong – that she would remember it because there was $68,000 in the suitcase.

THE COURT: I think your questions at that time, Mr. Sciarretta, were directed to how she could remember this defendant.

MR. SCIARRETTA: And I think that is when the comment took place: Well, how often do you come across $68,000 in a suitcase? That, your Honor, first of all, is one of the issues in the case. The witness indicated on the stand that she didn't know how much money was in the suitcase. I think the Court's comment, innuendo, would indicate to the jury that there was $68,000 in there, and I feel that that statement was prejudicial to my client.

Now, I don't want to pick on minor issues, but I do feel that that is one of the major issues and if, in fact, the jury

believes there was $68,000 in there, or whatever, that their understanding is that the Court believes there was $68,000 in [234] there and it's their province, and I think that was prejudicial. For that reason, I would note my objection and request a motion for a mistrial be granted at this time.

THE COURT: The motion for mistrial is denied.

MR. PETERSON: May I make an offer of proof at this time?

THE COURT: No.

Bring the jury in.

MR. PETERSON: There is one point, unrelated point.

THE COURT: All right.

MR. PETERSON: I am told by Agent Redding that as the jury was filing out for a recess, for the noon recess, Mr. Redding came in to tell me that he knows personally one of the jurors. I believe it's Vincent Deltondo, and he's personally familiar with him and knows him, not on a social basis but through his prior experience as a police officer.

I just want to bring that to the Court attention.

THE COURT: Very well. Bring the jury in.

(The jurors then resumed their places in the jury box.)

THE COURT: The record may show the jurors are now present together with Counsel and the defendant.

Please resume the stand, Miss Thomas.

MR. SCIARRETTA: Your Honor, may we have a conference at sidebar just momentarily?

(Proceedings were then had between the Court and Counsel at the bench as follows:)

[235] MR. SCIARRETTA: I don't know the nature of that contact, but I'm wondering if it was a situation where the juror was employed by the police or in some capacity was working with them or against them or was under investigation or –

MR. PETERSON: From what I know, Mr. Deltondo testified during voir dire that he was the manager of cocktail lounges, as I recall.

THE COURT: That's right; two of them.

MR. PETERSON: Mr. Redding informs me that his contact or basis for personal acquaintanceship with Mr. Deltondo is the fact that Mr. Redding used to be on the vice squad and came in contact with him through that method.

THE COURT: It's probably to the defendant's advantage, if anything.

MR. PETERSON: Well, Mr. Redding states that their relationship was always amicable.

MR. SCIARRETTA: Did he ever offer him a free drink?

MR. PETERSON: That I don't know.

(Proceedings were had in open court as follows:)

BY MR. SCIARRETTA:

Q Miss Thomas, just a few more questions.

First of all, you indicated that one of your duties in inspecting luggage was to determine whether or not there were any weapons; is that correct?

A Yes.

• • •

[372] • • • She didn't count it." But, circumstantially, there is no doubt that that bag contained $68,000. There they are, the stacks of currency, the figure on the bag. What else could it be? What else could it be? And from that point on, this little operation, this little conspiracy, is under surveillance. But it's not so little, really, is it? $68,000 cash winging its way to San Diego and Tijuana, the mecca of the drug traffic in this area.

MR. SCIARRETTA: Your Honor, I'll object to Counsel's categorization of –

THE COURT: Yes, I don't think there's any evidence in this case to justify that statement.

MR. PETERSON: When Margaret Canada arrives in San Diego, there're officers waiting to see where she's going to go, and she's met there by Clarence Scott Turner who, you will recall, approached her in the airport. There was no indication that Mrs. Canada waved him over. He approached her. He obviously knew who she was, and Mrs. Canada re-

trieved the green suitcase from the conveyor belt or whatever it is, and walked out of the airport. She handed the bag to Mr. Turner and they walked as if to go into that parking lot, then turned around and came back out and walked to the center island and then all the way down that center island to the waiting car where Anne Belle Welsh sat and off they went.

Then there was the driving around in circles and U-turns [373] and so forth on their way to that motel at Ninth and "A", and once they arrived there, Mrs. Canada and Mr. Turner got out of the care and went in to register.

How did they register? You recall that the first room that they rented was Room 27 and you'll see in the jury room Government's Exhibit 3, and they registered as Mr. and Mrs. S. Davis, 1440 South Bronson, Los Angeles, California; make of car, AMC, and the license number, and they paid cash. You recall what the testimony was with Mr. Markonni? That he went over to the boarding gate in the Detroit Airport and talked to the boarding agent and found out what the travel itinerary was for an S. Taylor.

A crime of concealment. Traveling under phony names, registering under phony names.

MR. SCIARRETTA: Your Honor, I'm going to object to that part of Counsel's argument with regard to the itinerary. There is no connection and there has been no testimony of that.

THE COURT: There was testimony that he got the itinerary of an S. Taylor.

MR. SCIARRETTA: That's exactly what he testified to.

THE COURT: Right. I think this is a perfectly permissible argument.

MR. PETERSON: Mrs. Canada has been under surveillance for some hours now, starting at the Detroit Airport, and she has yet to use her real name, traveling with $68,000 in her suitcase.

[374] What else is in that suitcase, by the way? Theresa Thomas recalls one other article of clothing, either a blouse

or jacket or something of that sort, but that's all. Winging across half the country with $68,000 and one other article of clothing. What is the reasonable inference to draw from that? A short trip at the very least.

And what later do we find in that green suitcase? Do you recall the testimony of Mr. Perkins who estimated the cost of the value of that heroin and cocaine that was found in that green suitcase? He estimated that the two kilos of heroin cost $25,000 apiece and he estimated that the pound of cocaine ran around fourteen or $13,000. Add it up; it comes up to about $64,000. And how much was in the green suitcase? $68,000. Circumstantial evidence.

His Honor will instruct you that circumstantial evidence is every bit as good as direct evidence in proving a person guilty of an offense – every bit as good.

Let's talk about circumstantial evidence some more. Government's Exhibit 9 found in the green suitcase. What was this cutting agent inside of when it was found in the suitcase? A Don Heller bag. And the receipt was on top of the bag.

Government's 10 was a Don Heller bag and inside that bag, along with clothing, was a Don Heller receipt. Now, what did Mrs. Canada have in her arms when she came back from shopping that afternoon? • • •

[386] • • • Don't you think by this time she might be a little worried that Welsh and Turner got caught at the border with all the stuff? Somehow this nefarious duo of Welsh and Turner were plotting against Mrs. Canada, Mrs. Canada who is out here with the $68,000 and one item of clothing in her suitcase, and for what purpose? What earthly purpose? Even Mr. Sciarretta couldn't come up with a decent reason. There's only one reason and when you consider all of this evidence and the logical, reasonable inferences that you can draw, there is only one conclusion and that is that Mrs. Canada entered into a conspiracy, an agreement not only with Turner and Welsh, but with Boyer Bracy to fly out here with $68,000

and give that money over to Welsh and Turner for the purchase of four pounds of heroin and one pound of cocaine.

Thank you.

THE COURT: Ladies and gentlemen of the jury, we'll take our evening recess at this time. Please remember the admonitions that I have given you and although you have now heard the evidence and the arguments of Counsel, I haven't had my chance at you yet, so you must not talk among yourselves about the case or with anyone else, or allow anyone else to talk to you about it, and not to form or express any opinion on it until I finally submit it to you.

You're excused until 9:15 tomorrow morning.

(Adjournment.)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 75-2696

UNITED STATE OF AMERICA,
Plaintiff-Appellee,

vs.

MARGARET CANADA,
Defendant-Appellant.

OPINION

[December 29, 1975]

Appeal from the United States District Court
for the Southern District of California

Before: HUFSTEDLER and WALLACE, Circuit Judges, and PALMIERI,* District Judge.

PALMIERI, District Judge:

This is an appeal from a judgment entered on a jury verdict finding appellant guilty of conspiracy to possess heroin and cocaine with intent to distribute, 21 U.S.C. § 846(a), and of possessing heroin and cocaine with the intent to distribute, 21 U.S.C. § 841(a)(1).

The appellant travelling under an assumed name, boarded a scheduled air carrier in Detroit on February 16, 1975, bound

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* Honorable Edmund L. Palmieri, United States District Judge, Southern District of New York, sitting by designation.

for San Diego, taking with her a suitcase containing a large amount of cash. The concatenation of events occurring immediately prior to her departure from Detroit, and in San Diego after arrival, led to her arrest the next day as she was proceeding speedily by car on a major highway in the direction of Los Angeles.

The appellant challenges the legality of two searches and the probable cause for her arrest.

The facts which the jury could find from the evidence are substantially the following.

The Airport Security Search in Detroit

On February 16, 1975, Theresa Thomas, an airlines security guard, was on duty at the Detroit Metropolitan Airport checking the carry-on baggage of departing passengers for weapons and explosives with the aid of an x-ray machine as part of the airline's anti-hijacking program. At approximately 5:45 p.m. a male carrying a green suitcase and accompanied by appellant approached her station. As the suitcase went through the x-ray machine, half of it was displayed on the screen as an indeterminate dark area. Thomas told the male that the suitcase would have to be opened. The man asked why it had to be opened since there was nothing in it, and Thomas informed him that it was necessary to see what was inside since the x-ray machine did not show the contents of half of it. Appellant's companion did not reply. The appellant, standing next to him, said nothing. Opening the suitcase, Thomas found one article of clothing and a grocery bag with a rubberband around it. She opened the bag and saw stacks of 20- and 50-dollar bills. As she closed the bag and returned it to the suitcase, she notice the figure $68,000 inked on the front of the bag. As the couple left, appellant said something to her companion which Thomas did not hear, to which the man replied, "Don't worry about it; it's okay."

Thomas noted which gate the pair proceeded to, found that appellant Canada was flying under the name S. Taylor, and

watched her board the plane for San Diego without her companion. Thomas reported all this to an agent of the Drug Enforcement Agency (OEA) at the airport.

The agent watched the male companion leave the airport and watched as he was arrested in the parking lot by local police for a traffic infraction. The agent learned from the local police that the man they had arrested was on record as a narcotics violator and that he was the son of two persons on record with the DEA as narcotics violators.

The Events in San Diego

This information was relayed to DEA agents in San Diego where surveillance of the airport was arranged in anticipation of appellant's arrival there. Appellant was met at the San Diego International airport by a male later identified as codefendant Turner. Appellant retrieved the green suitcase from a baggage conveyor belt and handed it to Turner. The couple then left the airport, walked into the parking lot, doubled back from the parking lot to the pedestrian island where they walked the length of the airport until they arrived at a waiting automobile driven by a female later identified as codefendant Welsh. During this maneuver, Turner continually glanced over his shoulder, paying particular attention to the front of the air terminal. In the course of driving to the downtown San Diego area, the trio executed a variety of maneuvers, including three or four U-turns in the middle of the block for no apparent reason, which are not satisfactorily explained by a lack of familiarity with the area, and which, in the opinion of one of the officers, were attempts to spot and lose any pursuer.

Appellant and Turner registered in a motel room as man and wife under assumed names. A second room was rented in Welsh's name. Three long distance calls to Detroit were made from one of the rooms, one to a known associate of the parents of the man who had accompanied appellant to the Detroit airport who were known narcotics violators. That evening as the trio drove to a cocktail lounge they executed numerous

maneuvers apparently intended to flush out and abort any surveillance.

The next morning appellant took a cardboard box and the green suitcase to the room where the other two had stayed. She then walked to the downtown area of San Diego, returned at 1:30 after the others had left, and waited in a state of obvious agitation for their return.

Turner placed an empty yellow duffel bag in the car and shortly thereafter he and Welsh drove directly to Mexico, crossing the border at 11:30 a.m. They were next seen returning to the motel at 4:10 p.m. Immediately thereafter, Turner rapidly removed from the car and carried into the motel a paper sack and the yellow duffel bag which appeared to contain objects which made the bottom form a V. Within four or five minutes, Turner came out of the room carrying the green suitcase and walking at a rapid pace. He almost threw the suitcase into the trunk of the car, and followed it with the duffel bag that now looked full and well packed. Turner positioned the vehicle near the motel office while appellant was in the office. When appellant came out of the office, she entered the car with the other two and Turner accelerated at a fast rate of speed and proceeded to an interstate highway and headed north. The DEA agents then stopped the car with the aid of uniformed police. They searched the car, found four pounds of heroin and one pound of cocaine in the green suitcase, and arrested appellant and her two codefendants.

The Airport Search of the Suitcase was Conducted Pursuant to a Valid Consent

Appellant's first complaint is that her fourth amendment rights were violated when the green suitcase being carried by her male companion was searched by an airline employee at the Detroit airport. If she should prevail on this issue, the charges against her require dismissal as the balance of the government's case would be the fruit of a poisoned search.

Silverthorne Lumber Co. v. *United States,* 251 U.S. 385, 391-92 (1920). However, we find no legal infirmity in the search. We find it was conducted pursuant to a valid consent.

First, there can be no doubt that the actions of the airline security guard constituted state action for fourth amendment purposes. *United States* v. *Davis,* 482 F.2d 893 (9th Cir. 1973). Second, the government argues that appellant does not have standing to object to the search because the searcher could not have known the luggage was in her custody. This is not a requirement for standing to object. The state of mind of the searcher regarding the possession or ownership of the item searched is irrelevant to the issue of standing.[1] Rather, standing to object is predicated on the objector alleging and, if challenged, proving he was the victim of an invasion of privacy. *Jones* v. *United States,* 362 U.S. 257, 261 (1960). In her original motion to suppress, appellant claimed the suitcase as hers. The government has not disputed this claim of ownership. In fact, the government's evidence that she transported it to San Diego and was seen with it there on several occasions lends support to her claim. This is sufficient to confer on appellant standing to object to its search.

The fact that appellant was not openly exercising control over the suitcase immediately prior to the search does not defeat her standing. *United States* v. *Mulligan,* 488 F.2d 732 (9th Cir. 1973), *cert. denied,* 417 U.S. 930 (1974) (car owner could object to its search though he had no control over the car when it was searched, had registered it under a fictitious name and had parked it in an acquaintance's driveway for over two months). Furthermore, she did not relinquish her protectible interest, nor her standing to object, by sharing access and control of the suitcase with her companion. *Mancusi* v. *DeForte,* 392 U.S. 364 (1968).

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[1] But see *United States* v. *Matlock,* 415 U.S. 164, 177 n.14 (1974), where the Court leaves open the question whether the government satisfies its burden for establishing third-party consent to a search by showing that the searching officers reasonably believed that the third party had sufficient authority over the area searched to consent to the search.

This brings us to the question of consent. The Supreme Court in *Schneckloth* v. *Bustamonte,* 412 U.S. 218 (1973), held that whether a consent to search is voluntary is a question of fact to be determined from all the circumstances and that the government is not required to prove knowledge of a right to withhold consent as a sine qua non of an effective consent. In *Davis, supra,* we dealt with an airport search similar to the instant case and held that the threhold question of whether or not there had been consent-in-fact must be decided in the affirmative before the precise *Bustamonte* question of voluntariness could be broached. The present case falls somewhere between the verbal consent in *Bustamonte* and the facts in *Davis.* As anticipated in *Davis,* we find that "the alternatives presented to a potential passenger approaching the screening area are so self-evident that his election to attempt to board necessarily manifests acquiescence in the initiation of the screening process." 482 F.2d at 914. Since the 1971 search in *Davis,* the nature and scope of airport searches have become much more widely known. Such searches have become an almost universal practice. The suitcase in question was voluntarily placed on a conveyor belt that led directly to the checkpoint and through an x-ray machine. While appellant and her companion may not have expected the contents of the suitcase to be subjected to a visual search,[2] the facts here are sufficient to support a finding of voluntary consent-in-fact to this further search. In *Davis,* the appellant's briefcase "'was taken from his hand, opened before he had a chance to really do or think anything.'" 482 F.2d at 914, incontrast, the airline agent here asked the appellant's companion for permission to open the suitcase and explained the need to do so before opening it.[3]

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[2] Only when baggage failed to pass the x-ray test was it subjected to visual search.

[3] "Q. All right. Now, what, if anything, did you say to the male that was carrying this green suitcase?

A. I took the bag over to the end of the belt and I asked the male if I could open it up. I had to check it, and he asked me why I had to open it and he said there wasn't anything in it, and I told him that it

Neither he nor appellant, who was present throughout the exchange, objected. The airline agent was fully justified in assuming she had the consent of both. We think this constitutes consent-in-fact voluntarily given.

Appellant further objects that she could not be bound by her companion's consent to the search, claiming that the cases which upheld third-party consent all involved absentee defendants. To refute this proposition, one need look no further than the leading case appellant cites, *United States* v. *Matlock*, 415 U.S. 164 (1974). There, the defendant was arrested in the yard of the house where he was staying. The officers did not ask his consent to search the house. They went to the door and obtained permission to search from a woman who was living there with him. The Court looked not to the defendant's presence or absence but to whether or not the third party "possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." 415 U.S. at 171. Common authority, the Court said,

> rests . . . on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

415 U.S. at 171 n. 7. Applying this language to the case before us, we find that appellant granted her companion sufficient control over the suitcase so that it is reasonable to conclude that she assumed the risk that he might permit it to be searched at the airport check point. Additionally, the preponderance of the evidence would warrant a finding that

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was necessary to tell what was inside because I couldn't read the x-ray machine, and he didn't say anything, so I opened up the bag.

Q. Where was the female during this period of time?

A. Right beside him."

appellant was acting as a courier and that her companion was in full charge of the boarding operation and gave effective consent on her behalf.

The Stop and Search of the Automobile in San Diego was Valid

Appellant next complains that there was no probable cause for the stop and search of the car, for the search of the green suitcase in the trunk of the car, or for the arrest of appellant and her companions, all of which were accomplished without warrants. She further argues that Welsh's consent to search the car did not give the police the right to search the green suitcase. We have concluded that, upon the totality of the circumstances in this case, there was probable cause for the warrantless stop and search of the car. Sufficient basis for the warrantless arrests arose upon the finding of contraband in the car. We do not reach the question of consent since the probable cause to search encompassed a search of the suitcase.

A search that is warrantless is nevertheless valid if the officers have probable cause to believe that the object of the search contains contraband and there exists the exigent circumstance that it is "threatened with imminent removal or destruction." *Hernandez* v. *United States*, 353 F.2d 624, 627 (9th Cir. 1965), *cert. denied*, 384 U.S. 1008 (1966). We find that the officers here had probable cause to believe that the car, and the suitcase being transported therein, contained contraband. In arriving at this conclusion, we have considered all the relevant facts known to the officers, as set forth above, and all the reasonable inferences that could be drawn from these facts by the officers. Appellant analyzes each bit of information the officers had, expounding on the tenuous nature of some and fashioning an innocent fabric for others. "Unquestionably, no one item of the government's evidence, considered in solation, would have been sufficient . . ." to estab-

lish probable cause. *United States* v. *Patterson*, 492 F.2d 995, 997 (9th Cir. 1974). However, even assuming that all these facts could be given some explanation consistent with innocent behavior, which is difficult to assume here, there nevertheless came a time at which

> [t]he succession of superficially innocent events had proceeded to the point where a prudent man could say to himself that an innocent course of conduct was substantially less likely than a criminal one.

Patterson, supra, 492 F.2d at 997. *See United States* v. *Martin*, 509 F.2d 1211 (9th Cir. 1975). "A search based upon [the] concurrence [of the events here] would not likely invade the privacy of an innocent person." *Hernandez, supra*, 353 F.2d at 627.

The items to be searched, the car and the suitcase, were certainly "threatened with imminent removal." Appellant and her companions drove away from the motel "at a fairly fast rate of speed" and were headed north out of San Diego on an interstate highway. Since there was probable cause to believe that the car contained contraband, these facts fit the "automobile exception" to the requirement of a search warrant. *Chambers* v. *Maroney*, 399 U.S. 42 (1970) and cases cited therein; *Carroll* v. *United States*, 267 U.S. 132 (1925).

Appellant argues that the exceptional circumstances rule is not applicable because the officers had time to obtain a warrant and did not do so. The burden rests on the government to prove that it was not practical to secure a warrant before the car was stopped. *United States* v. *Jeffers*, 342 U.S. 48 (1951); *Hernandez* v. *United States*, 353 F.2d 624 (9th Cir. 1965). However, appellant errs in suggesting that the officers were required to begin seeking a warrant at 11:30 a.m. when the car crossed the border into Mexico. The officers may well have thought that there was insufficient probable cause to support a warrant until the car returned from Mexico. Nor could they predict the time when or the place at which the car would recross the border. After the return to the motel

at approximately 4:10 p.m., they had several additional indicia of crime to lend weight to a case for probable cause: the car had made a short trip across the border in an area with a high incidence of contraband smuggling carrying a suitcase in which large amounts of cash had been seen; the car had left with the duffel bag empty and returned with it containing something that caused its bottom to sag; and the persons under surveillance were in a great rush to depart from the motel after their return from Mexico. The fourth amendment does not require that the government act precipitously or apply for a warrant prematurely. The officers could properly extend their surveillance in an attempt to obtain additional evidence or to expand the reach of the dragnet to ensnare other, as yet unknown, confederates. Moreover, the unpredictable unfolding of this criminal dama clearly left the agents uncertain as to when or where to expect narcotics to appear. Indeed, the automobile in question had left the United States and the agents could not be certain that it would reappear in the Southern District of California, much less know just when to expect it. The rapid succession of events after it reappeared, including the brief period of little over five minutes in total spent at the motel, precluded any possibility of the agents approaching a magistrate at that juncture. The government has satisfied its burden of demonstrating that there was insufficient time to procure a warrant.[4]

Conclusion

We have examined the other grounds urged by appellant for reversal and find them meritless. We are satisfied after examination of the entire record that appellant received a fair trial free from prejudicial error.

The judgment of conviction is affirmed.

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[4] The government testimony that February 17, 1975, was a federal holiday does not alone meet its burden, but it is probative of the time that would have been required to obtain a warrant on that day.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 75-2696

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

MARGARET CANADA,
Defendant-Appellant.

ORDER

(Filed February 25, 1976)

Before: HUFSTEDLER and WALLACE, Circuit Judges, and PALMIERI,* District Judge.

The panel as constituted above has voted to deny the petition for rehearing; Judges Hufstedler and Wallace have voted to reject the suggestion for rehearing en banc and Judge Palmieri has recommended rejection of the same.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* Honorable Edmund L. Palmieri, United States District Judge, Southern District of New York, sitting by designation.

SUPREME COURT OF THE UNITED STATES

No. A-771

MARGARET CANADA,
Petitioner,

vs.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 23, 1976.

/s/ WILLIAM H. REHNQUIST
Associate Justice of the Supreme
Court of the United States

Dated this 8th day of March, 1976.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 75-2696

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

MARGARET CANADA,
Defendant-Appellant.

ORDER

(Filed March 16, 1976)

Before: HUFSTEDLER and WALLACE, Circuit Judges, and PALMIERI,* District Judge.

The motion of appellant to withhold final decision until two companion cases have been decided is denied.

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* Honorable Edmund L. Palmieri, United States District Judge, Southern District of New York, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 75-2696

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

MARGARET CANADA,
Defendant-Appellant.

ORDER

(Filed April 12, 1976)

Before: HUFSTEDLER and WALLACE, Circuit Judges, and PALMIERI,* District Judge.

Upon due consideration, it is ordered that appellant's motion for stay of mandate is denied nunc pro tunc as of February 25, 1976.

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* Honorable Edmund L. Palmieri, United States District Judge, Southern District of New York, sitting by designation.